NOTICE OF ORAL *EX PARTE* CONTACTS

February 22, 2006

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Portals II, Room TW-A325
Washington, DC 20554

Re: Ex Parte Notice filed electronically separately in the two proceedings captioned:

In re Cellular Telephone & Internet Association's Petition for Declaratory Ruling Regarding Early Termination Fees in Wireless Service Contracts, WT Docket No. 05-194,

In the Matter of Developing a Unified Intercarrier Compensation Regime, Docket No. CC 01-92, Missoula Intercarrier Compensation Reform Plan, DA 06-1510

Dear Ms. Dortch:

On Tuesday, February 20th, I met separately with FCC Commissioner Michael Copps and his legal advisor Scott Deutchman, with Chairman Kevin Martin and his legal advisor, Dan Gonzales and with Commissioner Jonathan Adelstein. The following day, on Wednesday February 21, 2007, I met with Commissioner Debi Tate and her legal advisor Ian Dillner. I respectfully request any waivers needed to file this notice of the February 20th discussions one day out of time.

During all these meetings I discussed critical aspects of issues raised in the two pending dockets listed, *supra*. First, I explained while Nebraska originally opposed the Missoula Plan as it did not adequately address the financial impact on early adopter states. I explained that Nebraska with approximately 1.7 million ratepayers is assessed $65 million annually for intrastate costs and thereby take a huge burden off the federal fund while others have yet to reduce access, rebalance local rates or establish a fund. Further, if all states bore their intrastate costs, some of the burden would be lifted from the federal fund. In addition, with Chairman Martin and Commissioner Tate, I suggested that if this plan could not be approved because of resistance from the industry, Congress, within the Commission or a combination of some or all of the aforementioned, another tool that could be considered would be to develop a formula whereby contributions to each state would be determined and that the states would be responsible for disbursement.

Second, I talked about potential pending FCC action on commercial mobile radio service early termination fees. I discussed my opinion that Early Termination Fees (ETFs) cannot rationally be construed as anything other than "other terms and conditions" of service under 47 U.S.C. §332(c)(3)(A) subject to State authority. I asked the commissioners to reexamine the economic and policy assumptions underlying the 1992 FCC Cellular Bundling Order and to determine whether those assumptions are relevant today. This was in keeping with a resolution I offered at the National Association of Regulatory Utility Commissioners meeting but was tabled on a 5-4 vote until July, 2007, after the Order addressing this issue may have been decided and published.

Inasmuch as the 1992 decision included equipment costs, I feel that, after the explosion of growth in the wireless industry that retail merchandise should not be included in a rate; that once the wholesale cost of the equipment has been recouped that the rate should be reduced; that once equipment costs have been recouped that the contract is terminated; and, that if a consumer pays retail price at the point of purchase, that the rate for a month to month plan should be less than an ETF contract as the purchase is not subsidized by the carrier and has paid a retail price rather than a wholesale price; and finally, that a consumer should be able to for the equipment cost at any time and be released from a contract

The resolution asked the Commission to reexamine the economic and policy assumptions underlying the 1992 FCC Cellular Bundling Order to determine whether wireless carriers' – or their independent vendors' – use of ETFs remains an "efficient promotional device" that benefits both consumers and wireless carriers. The Resolution included the following content.

The FCC should immediately instigate an investigation of equipment and customer acquisition or retention costs, cited by the wireless industry as justification for ETFs, to assure such costs are being reasonably and appropriately recovered from consumers.

Many wireless carriers impose ETFs that range from $150 to $240, on customers who seek to, or for and various reasons must, cancel their service prior to the expiration of the service contract's term. In addition to ETFs imposed by wireless carriers, many independent vendors of wireless equipment and services impose an additional ETF that varies in amount, depending on the vendor.[1.] Some have estimated that ETFs cost consumers $4.6 billion from 2002 through 2004 in penalties paid or foregone opportunities to obtain lower-cost services.[2] At the same time, consumer complaints regarding ETFs are consistently in the top five categories of informal complaints and inquiries received by the FCC's Consumer and Governmental Affairs Bureau. (*See* <http://ftp.fcc.gov/cgb/quarter/welcome.html>) Wireless carriers assert that ETFs are necessary in order to reduce, or subsidize, customers' costs of wireless products (i.e., handsets) and services (rate plans) and to ensure that carriers' fully recover customer-acquisition costs.[3]

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[1] In re Cellular Telephone & Internet Association's Petition for Declaratory Ruling Regarding Early Termination Fees in Wireless Service Contracts, WT Docket No. 05-194, Utility Consumers Action Network Comments, pp. 15-19 (Aug. 5, 2005).

[2] Edmund Mierzwinski, "Locked in a Cell: How Cell Phone Early Termination Fees Hurt Consumers," U.S. PIRG Education Fund, pp. 20-21 (Aug. 2005) at http://www.uspirg.org/uploads/6K/L1/6KL1e4XLElQZgyFz7hpKKQ/lockedinacell05.pdf.

[3] "Early Termination Fees – CTIA Position" http://ctia.org/industry_topics/topic.cfm/TID/41/CTID/12 (accessed Feb. 5, 2007)).

The Federal Communications Commission ("FCC") has not revisited its 1992 conclusion that "subsidizing wireless phones" via the utilization of ETFs coupled with fixed term contracts "is an efficient promotional device which reduces barriers to new customers" during the intervening fifteen years.[4] The conditions in the wireless market that may have justified the economic and policy assumptions underlying the Cellular Bundling Order have changed radically since 1992. The wireless industry has flourished since 1992, growing its subscriber base from just under 9 million to over 219 million by mid-2006, and consistently showing solid revenue and profit increases compared to the traditional wireline sector during this time frame. Wireless carriers have aggressively sought and obtained designation as Eligible Telecommunications Carriers ("ETCs") under 47 U.S.C. §214(e), allowing them to subsidize their costs to serve customers in high-cost areas with monies disbursed from the Federal Universal Service Fund ("USF"). According to the most recent data compiled by the Universal Service Administration Company, the total amount of Federal USF subsidies received by wireless carriers has more than doubled in the last two years, from $471 million to approximately $1 billion in 2006, and constitutes over 99 percent of all Federal USF subsidies received by competitive ETCs. The wireless industry has become increasingly concentrated in the hands of a few carriers and equipment manufacturers since 1992.[5]

Finally, newly elected Nebraska Commissioner Tim Schram accompanied me at all meetings; however, did not partake in the discussions regarding these matters.

In accordance with section 1.1206 of the Commission's rules, this letter is being filed electronically. Please feel free to contact me at 402-471-3101 if you have any questions.

Sincerely,

/s/ Anne C. Boyle
Anne C. Boyle
Commissioner, Nebraska Public Service Commission

cc: Chairman Martin
Commissioner Copps
Commissioner Adelstein
Commissioner Tate
Michele Carey, Office of the Chairman
Ian Dillner, Office of Commissioner Tate
Scott Deutchman, Office of Commissioner Copps
Scott Bergman, Office of Commissioner Adelstein
John Hunter, Office of Commissioner McDowell

[4] In re Bundling of Cellular Customer Premises Equipment and Cellular Service, Report and Order, 7 F.C.C.R. 4028-30 (1992).

[5] *See* e.g., Wireless Competition Bureau, Federal Communications Commission, *Eleventh Annual CMRS Report*, Appendix A, Tables 1 & 4 (Sept. 29, 2006); Mike Dano, "Biggest Handset Makers Take More Market Share," *RCR Wireless News* (July 28, 2005)